

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Thurgood Marshall United
States Courthouse, 40 Foley Square, in the City of New York,
on the 19th day of March, two thousand thirteen.

PRESENT: DENNIS JACOBS,
Chief Judge,
AMALYA L. KEARSE,
SUSAN L. CARNEY,
Circuit Judges.

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-v.-

12-471-cr

LAURA CULVER,
Defendant-Appellant.

FOR APPELLANT: RONALD B. RESETARITS for Terence
S. Ward, Federal Defender, New
Haven, CT.

FOR APPELLEE: KRISHNA R. PATEL for David B.
Fein, United States Attorney,
District of Connecticut (Sandra
S. Glover on the brief),
Bridgeport, CT.

1 Appeal from a judgment of the United States District
2 Court for the District of Connecticut (Eginton, J.).
3

4 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
5 **AND DECREED** that the judgment of the district court be
6 **VACATED and REMANDED.**
7

8 Laura Culver appeals from the order of the United
9 States District Court for the District of Connecticut
10 (Eginton, J.), sentencing her to serve 96 months in prison
11 for producing child pornography of a minor child under her
12 custody and control, in violation of 18 U.S.C. § 2251(a).
13 We assume the parties' familiarity with the underlying
14 facts, the procedural history, and the issues presented for
15 review.

16 We review a district court's sentencing decision for
17 procedural and substantive reasonableness. Gall v. United
18 States, 552 U.S. 38, 51 (2007); United States v. Booker, 543
19 U.S. 220, 260-62 (2005). Culver argues that her sentence is
20 procedurally unreasonable because the district court made
21 multiple references to Facebook, which had little to no
22 application to the facts of her case; and that the sentence
23 is substantively unreasonable because the judge gave
24 outsized influence to Facebook, instead of other relevant
25 factors.

1 Culver did not object to the district court's
2 discussion of Facebook at the sentencing. Her "allegations
3 concerning the court's improper consideration" of an
4 extraneous factor "should be reviewed for plain error."
5 U.S. v. Cossey, 632 F.3d 82, 86 (2d Cir. 2011). "To
6 establish plain error, [an] appellant must show there was
7 (1) error (2) that is plain and (3) that affects substantial
8 rights." Id. at 86-87.

9 In justifying its decision to impose a sentence of
10 eight years instead of six, the district court referenced
11 "Facebook, and things like it, and society has changed."
12 Sentencing Hr'g Tr. 47-48, Jan. 30, 2012. The court
13 speculated that the proliferation of Facebook would
14 facilitate an increase in child pornography cases. The
15 court said it hoped Mark Zuckerberg (who founded Facebook)
16 was "enjoying all his money because . . . he's going to hurt
17 a lot of people" Id. at 16-17.

18 Culver is correct that the court's lengthy discussion
19 of Facebook had no clear connection to the facts of her
20 case. It is plain error for a district court to rely upon
21 its own unsupported theory of deterrence at sentencing,
22 especially where, as here, that theory has little

1 application to the actual facts of the case itself. See,
2 e.g., Cossey, 632 F.3d at 88 ("It is uncontroversial to
3 conclude that a sentencing decision that relies on factual
4 findings that were unsupported in the record, and thus could
5 not possibly have been established by a preponderance of the
6 evidence, seriously affects the fairness, integrity, and
7 public reputation of judicial proceedings."); United States
8 v. Juwa, 508 F.3d 694, 701 (2d Cir. 2007) ("[F]actual
9 matters considered as a basis for sentenc[ing] must have
10 some minimal indicium of reliability beyond mere
11 allegation.") (quotation omitted). This error undoubtedly
12 affected Culver's substantial rights; the court stated that
13 it would have granted a sentence of six years if not for its
14 concerns about Facebook and general deterrence. See
15 Sentencing Hr'g Tr. at 42 ("[W]hat we're looking at is
16 general deterrence, and the general deterrence is very
17 important, and frankly, that's why I went to eight [years]
18 instead of six.").

19 The government argues that the district court was
20 merely concerned about the extent to which various new
21 technologies may facilitate child pornography, rather than
22 Facebook specifically. In that sense, Facebook was a

1 reference to the internet, using synecdoche. But the
2 government does not explain (because it cannot) the role of
3 new technology *in this case*. Culver did not use the
4 internet to commit her crime, and it should not have played
5 a predominant role in her sentencing. The case is therefore
6 remanded to the district court for resentencing consistent
7 with this opinion.

8 This remand should not be construed to suggest that the
9 sentence was substantively unreasonable. An eight-year
10 sentence was still a twenty percent reduction below the
11 bottom of the recommended Guidelines range. Though Culver
12 assisted in the prosecution of her accomplice and boyfriend,
13 Edgardo Sensi, her crime was particularly abhorrent. Thus,
14 a sentence of eight years was within the court's substantive
15 discretion. See, e.g., United States v. Rigas, 583 F.3d
16 108, 123 (2d Cir. 2009) (explaining that a sentence must be
17 "shockingly high, shockingly low, or otherwise unsupportable
18 as a matter of law" in order to be substantively
19 unreasonable). Still, that discretion should be exercised
20 without the influence of procedural error.

1 Finding no merit in the remaining arguments, the
2 judgment is **VACATED AND REMANDED** for resentencing.

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5 FOR THE COURT:
6 CATHERINE O'HAGAN WOLFE, CLERK
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